HAINIE HAMID

v.

PP

COURT OF APPEAL, KUALA LUMPUR
DENIS ONG JCA
MOHD SAARI YUSOFF JCA
MOHD NOOR AHMAD JCA
[CRIMINAL APPEAL NO: Q-05-8-1999]
7 MARCH 2003

CRIMINAL LAW: *Penal Code - Section 300 - Murder - Accused convicted of murder and sentenced to death - Defence - Exception 4 to s. 300 - Death caused without premeditation in a sudden fight - Whether trial judge failed to consider availability of defence - Whether conviction and sentence ought to be substituted*

The deceased was involved in a fight with PW3. The accused, together with PW4 and PW5, intervened to stop the fight. However, the fight resulted in the accused stabbing the deceased with a knife. The post-mortem report revealed that the deceased died of a penetrating wound at the back of his chest. The High Court judge convicted the accused of murder on the uncorroborated evidence of PW3 and PW4, and sentenced him to death. The accused appealed to this court against the said decision.

Held:
Per Mohd Noor Ahmad JCA

[1] Exception 4 to s. 300 of the Penal Code ('PC') provides a defence to a murder charge by reducing it to one of causing death without premeditation in a sudden fight. For the said exception to apply, it must be proven that (i) there was a sudden fight; (ii) there was no premeditation; (iii) the act was committed in the heat of passion; and (iv) the assailant had not taken any undue advantage or acted in a cruel manner. (pp 140 g & 141 b)

[1a] In the present case, the first and second conditions clearly have been satisfied in that the fight between the accused and the deceased occurred suddenly or that the fight was unpremeditated. (p 140 h)

[1b] As to the third and fourth requirements, the acts of the accused were done within very short intervals with no intervals for cooling off. In such a situation, there could not be much room for discriminating between the respective degree of blame with reference to the state of things, either at the commencement of or in the course of the fray. (p 141 c-f)

[2] The trial judge had failed to consider exception 4 to s. 300 of the PC and therefore was a misdirection on his part which should allow the conviction and sentence to be set aside. This court however found that the accused had caused the death of the deceased and sentenced him under s. 304(a) of the PC to 18 years' imprisonment to take effect from the date of his arrest. (p 141 a)

[Death sentence of accused reduced to 18 years' imprisonment.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Simati terlibat dalam suatu pergaduhan dengan PW3. Tertuduh, bersama-sama PW4 dan PW5, masuk campur untuk meleraikan pergaduhan tersebut. Walau bagaimanapun, pergaduhan itu berakhir dengan tertuduh menikam simati dengan sebilah pisau. Laporan post mortem menunjukkan bahawa simati meninggal dunia akibat suatu luka yang telah menembusi belakang dadanya. Hakim Mahkamah Tinggi telah menyabitkan tertuduh dengan kesalahan membunuh atas keterangan PW3 dan PW4 yang tidak tersokong, dan memutuskan hukuman mati ke atasnya. Tertuduh telah membuat rayuan ke mahkamah ini terhadap keputusan tersebut.

Diputuskan:
Oleh Mohd Noor Ahmad HMR

[1] Pengecualian 4 kepada s. 300 Kanun Keseksaan ('KK') memberikan pembelaan terhadap pertuduhan membunuh dengan mengurangkannya kepada menyebabkan kematian tanpa dirancang dalam sesuatu pergaduhan yang berlaku secara tiba-tiba. Untuk pengecualian tersebut terpakai, haruslah dibuktikan bahawa (i) terdapat pergaduhan yang berlaku tiba-tiba; (ii) tidak terdapat perancangan terlebih dahulu; (iii) tindakan itu dilakukan dalam keluapan perasaan; dan (iv) penjenayah tidak mengambil kesempatan yang tidak setimpal atau berlaku secara kejam.

[1a] Dalam kes semasa, syarat-syarat pertama dan kedua dengan jelasnya terbukti dalam mana pergaduhan di antara tertuduh dan simati berlaku secara tiba-tiba atau pergaduhan tersebut tidak dirancang terlebih dahulu.

[1b] Berkenaan dengan syarat-syarat ketiga dan ke-empat, perbuatan tertuduh dilakukan dalam jangkamasa yang singkat di mana tidak terdapat masa untuk menenangkan diri. Dalam halkeadaan sedemikian, tidak mungkin terdapat banyak ruang untuk membezakan di antara tahap-tahap kebersalahan berkaitan dengan keadaan yang wujud, sama ada pada permulaan atau semasa berlakunya kekecohan.

[2] Hakim bicara gagal untuk mengambilkira pengecualian 4 kepada s. 300 KK dan oleh itu telah tersalah-arah dirinya sekaligus mengharuskan pengetepian sabitan dan hukuman tertuduh. Walau bagaimanapun, mahkamah ini mendapati bahawa tertuduh telah menyebabkan kematian simati dan menjatuhkan hukuman 18 tahun penjara di bawah s. 304(a) KK yang bermula dari tarikh penangkapannya.

Hukuman mati tertuduh dikurangkan kepada 18 tahun penjara.]

Case(s) referred to:
Soh Cheow Hor v. Regine [1960] 26 MLJ 254 ***(refd)***

Legislation referred to:
Penal Code, ss. 300, 304(a)

For the appellant - Robin Hii; M/s Robin Hii & Co
For the respondent - Mahmud Hj Abdullah DPP

Reported by M Maheswaran

JUDGMENT

Mohd Noor Ahmad JCA:
The appellant was convicted and sentenced to death for the murder of one Ting Kung Kui committed on 28 December 1997 between 12am and 12.30am at the five footway of shop no. 24 Bank Road, Sarikei, Sarawak. On appeal, we allowed the appeal, quashed the conviction and set aside the sentence but substituted with a conviction under s. 304(a) of the Penal Code and sentenced him to 18 years' imprisonment with effect from the date of arrest.

The conviction of the appellant is mainly based on the ocular evidence of PW4 and PW5. The facts emerging from the evidence of these two main witnesses coupled with the evidence of the other prosecution witnesses may be summarized as follows.

On the night of 27 December 1997 around midnight, after an earlier altercation with PW3, the deceased and another Chinese man returned to PW3's burger stall in a motor van, each armed with a Nibong baton. The deceased approached PW3 while the other Chinese man waited beside the motor van. The deceased then hit at the left side of PW3's body with the baton. PW3 managed to embrace the deceased. While PW3 was embracing the deceased, PW4, PW5 and the appellant went to help PW3. PW4 used a chair to hit the deceased while PW5 and the appellant used an iron rod each to hit the deceased. After the hit, the deceased fell down pinning PW3 underneath him. Then the appellant approached the other Chinese man and hit him with an iron rod. The other Chinese man fainted.

Thereafter, the appellant went to the burger stall and returned with a knife to the place where PW3 and the deceased were struggling and stabbed the deceased. The post-mortem reveals that the deceased suffered a penetrating wound on the right chest which injured the liver and another penetrating wound at the back of the chest which injured the right lung and some 21 superficial cut wounds. The cause of the death was due to severe chest injuries with massive internal bleeding. The penetrating wound at the back of the chest caused the death.

The appellant in his defence admitted his involvement in the fight with the other Chinese man but denied stabbing the deceased with the knife. The learned judge held that there was neither evidence of grave and sudden provocation nor the right of private defence and that the defence of denial was an afterthought. And the appellant was convicted on the uncorroborated evidence of accomplices (PW3 and PW4) after the learned judge had warned himself of the danger of acting on such evidence.

We decline to interfere with the findings of fact by the learned judge. However, we are compelled to disturb his finding as to the guilt of the appellant by reason of his complete failure to address his mind on exception 4 to s. 300 of the Penal Code, that is to say, death caused without premeditation in a sudden fight. On the evidence, it is manifestly clear that there was a sudden fight or the fight was unpremeditated. Hence, the learned

judge should have considered the defence available to the appellant under the exception. As there was a non-direction by the learned judge on this issue there was a misdirection. Therefore, we now take upon ourselves the task of analyzing the evidence towards this end. It is trite law that to invoke the exception, four requisites must be satisfied, that is to say, (i) it was a sudden fight, (ii) there was no premeditation, (iii) the act was committed in the heat of passion, and (iv) the assailant had not taken any undue advantage or acted in a cruel manner.

With regard to conditions (i) and (ii) the facts speak by themselves. On conditions (iii) and (iv), the evidence reveals that the acts of the appellant in the course of the melee leading to the stabbing of the deceased were done within very short intervals apparently with no opportunity for cooling off. As usual in the fight, the blood already heated up was warmed at every subsequent stroke and the voice of reasons was not heard on either side in the heat of passion. Under such circumstances there cannot be much room for discriminating between the respective degree of blame with reference to the state of things either at the commencement of or in the course of the fray. It is settled law that when an accused person endeavours to bring himself within one of the exceptions, it is sufficient for his purpose if a reasonable doubt is raised in the mind of the trial judge as to whether or not the necessary factors exist. If as a result of the evidence of the whole case, taken and considered together the learned judge finds himself in genuine doubt as to whether or not the case falls within one of the exceptions, then his verdict on the point must be in favour of the accused (see *Soh Cheow Hor v. Regine* [1960] 26 MLJ 254). In the light of the factors we have already said, it is impossible for us to say that the learned judge, if he had fully directed his mind to the exception, would necessarily still have found the appellant guilty of murder.

Therefore, in view of the borderline nature of the evidence relating to the exception and having regard to the fact that the conviction for murder was based on the uncorroborated evidence of the accomplices, to our mind, it would not be safe to allow the murder conviction to stand.

In our opinion, the sentence imposed is sufficient to meet the need of public interest.

As regards the exhibits, we confirm the order of the learned judge made on 2 February 1999 (per Record of Appeal at p. 211).